IN THE

Supreme Court of the United States

October Term, 1963

No. 3[illegible]

JOHN JOSEPH CRANE and ROBERT B. SILLS,
Petitioners.

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justice of the Supreme Court of the United States.

Comes now John Joseph Crane and Robert Bernard Sills, petitioners herein, by and through their undersigned attorneys, and respectfully pray this honorable court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 8th day of May, 1963, and the order of the same court denying rehearing entered on the 15th day of June, 1963.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 316 Fed. 2nd 907. The text of this opinion is found in Appendix A.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Rule 37 (B)(1)(2) of the Federal Rules of Criminal Procedure and 28 U. S. C. 1254.

The United States Court of Appeals for the Fifth Circuit rendered its opinion in this case on the 8th day of May, 1963 (Appendix A) and thereafter a petition for rehearing was timely filed. Thereafter on the 15th day of June, 1963, the said Court entered its order denying rehearing without opinion.

Questions Presented

1. In the construction of 15 U. S. C., Section 77 (Q) (A), did the United States District Judge commit error when he in effect by the sentences imposed failed to follow the holdings in the second circuit to the effect that the violation of this section is predicated upon the fraudulent scheme employed in the sale of securities and not in the use of the mails which part is used solely to create a basis for federal jurisdiction, and each mailing or use of the mails does not constitute a separate crime or offense as set out in *United States* v. *Hughes*, D. C. N. Y., 1961, 195. F. Supp. 795.

2. Did the United States District Judge commit error when he refused to grant the petitioners a new trial when

it was discovered that the prisoners had been led into the court room hand-cuffed and shackled together while prospective members of the jury panel were present. And further, the taking out and bringing in of the petitioners to the Federal building each day of the trial while hand-cuffed and shackled together, after having walked four blocks in the presence of a Deputy United States Marshal.

3. Did the United States District Judge commit error when he refused to grant the petitioner, John Joseph Crane, as president of Insured Capital Corporation, motion to suppress the evidence in the form of the books and records of the said corporation, which had been seized by a subpoena *duces tecum* issued under the laws of the State of Florida.

Statutes and Rules Involved

18 U. S. C. 371;
18 U. S. C. 1341;
15 U. S. C. 77 (Q) (A);
Rule 41 (E) of the Federal Rules of Criminal Procedure.

Statement of the Case

These proceedings were commenced by the indictment in Eleven (11) Counts of Robert Zane, Herbert Gilmore, Joseph A. Peel, Jr., John Joseph Crane, Robert Bernard Sills and Floyd A. Holzapfel, filed June 15, 1961, in the United States District Court for the Southern District of Florida.

The indictment charges offenses committed in the Southern District of Florida, to wit: the first Five Counts allege the formation of a scheme to defraud and the use of the mails in the furtherance of the device and scheme to defraud, by all of the defendants, in violation of Section 77 (Q) (A), Title 15, United States Code. Counts Six (6) through Ten (10) re-allege the devising of a scheme to defraud by the defendants and charge the placing, in an authorized depository for mail matter, of letters for the purpose of executing the scheme to defraud, and to obtain money and property and fraudulent pretenses, representations and promises, in violation of Section 1341, Title 18, United States Code. Count (11) Eleven charges the formation of a conspiracy among the defendants to wilfully and knowingly violate Section 77 (Q) (A), Title 15, U. S. C., and Section 1341, Title 18, U. S. C., in violation of Section 371, Title 18, U. S. C., and sets forth Eight (8) overt acts committed by the defendants in pursuance of said conspiracy.

The appellants, on the 21st day of November, 1961, filed their motion to require the United States of America, to furnish them with an exact copy of all "Documents * * * and all other written material to be offered or which will be sought to be offered in evidence.

At this time these defendants—in fact, each defendant named in the indictment—had no knowledge that the United States had all the files, papers, letters and records of the corporation which was set forth in the indictment as Insured Capital Corporation.

On the 1st day of February, 1962, the Honorable George W. Whitehurst entered an order that said motion be denied with the exception that the government was ordered to permit the defendants to inspect and copy or photo

graph the following items: (A) the letters that are made the basis of the individual Counts of the indictment; (B) the financial statements mentioned in Paragraph 7 of Count One of the indictment; and; (C) the advertisements (newspapers) mentioned in Paragraph 9 of Count One of the indictment.

Appellants designated this ruling as error in their motion for new trial (Ground Number 5), and assert it as a question involved in this appeal.

The trial of this cause began on March 19, 1962, in Orlando, Florida, and proceeded against defendants, Zane, Gilmore, Peel, Crane and Sifls, defendant Holzapfel having been granted a continuance on the same date as to the charges against him.

At the trial of this case, on the first day of taking of testimony, the Government produced for the first time all the office files and records of the corporation which was alleged by the government to have been set up by these defendants for the carrying out of the scheme to defraud and in furtherance of said scheme, and the entire government's case was built upon and around these records so produced.

The government had obtained the foregoing files, papers letters and other such documents in the following manner: the County Solicitor of Orange County, Florida, (the officer charged with the prosecution of all felonies less than capital in nature in Orange County, Florida) in October of 1960, caused to be issued by the Criminal Court of record of that county a subpoena *duces tecum* directed to Miss R. G. Edminson, as secretary-treasurer of Insured Capital Corporation, the company which was said by the government to have been the vehicle through which the defendants consummated their frauds. The subpoena was

returnable *instanter* and directed that Miss Edminson bring "all the books and records" of the corporation to the Solicitor's Office (T. 183-184).

The two sheriff's deputies who served the subpoena assisted her in gathering up these books and records and taking them to the Solicitor's Office.

From this time up until two weeks before trial of this cause, a period of almost one year and a half, the books and records were kept in the possession, custody and control of the County Solicitors Office. At no time during this period had an order issued from any court impounding the books and records. Neither of these appellants nor any of the defendants was under indictment by the State Grand Jury or was informed against by the County Solicitor's Office at the time the books and records were seized nor thereafter.

During the months of October and November, 1960, representatives of the Florida Securities Commission and the United States Securities Exchange Commission were permitted to examine the books and records in the County Solicitor's Office (T. 279-280).

Two weeks prior to trial, the books were voluntarily turned over to these same representatives who kept them in their possession until they were produced in trial (T. 251-263) at no time had an order issued from the Trial Court impounding the books and records.

No subpoena duces tecum was issued by the United States to the County Solicitor of Orange County until the Friday preceding the beginning of the trial on Monday and after the files, books and records were already in the possession of the United States Attorney and had been for some period of time (T. 262).

On March 20, 1962, when Government witnesses testified as to the method of initial acquisition of the books and records, appellants orally moved to supress them as evidence. On the following day, with the permission of the Court and pursuant to directions by the Court, these appellants filed a written motion for return of property and to suppress evidence. Argument was had, and the Court made its ruling to the following day. On March 22, 1962, the Court entered its ruling denying appellants' motion.

> "After hearing the arguments by counsel for all of the defendants as well as the Government, the Court had reached the conclusion and so holds:
>
> (1) That none of the defendants are persons aggrieved by an unlawful search and seizure within the contemplation of Rule 41 E of the Federal Rules of Criminal Procedure and therefore are without standing to obtain the relief sought by such motions.
>
> And (2) that property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in the possession of the officials of Orange County, Florida, until it was delivered to the United States Security and Exchange Commission for use in the prosecution of this case and that such property is now lawfully in the control and possession of the United States Attorney for this district.
>
> Each of such motions for the return of such property and the suppression of evidence is therefore denied" (T. 343-344).

Appellants designated this ruling as error in their motion for new trial (Ground Number 6) and assert it as a question involved in this appeal.

At the closing of the evidence the Court dismissed Counts Four (4) and Ten (10) of the indictment and Number Five (5), Number Six (6), Number Seven (7) and Number Eight (8) of the overt acts charged under Count Eleven (11), (the conspiracy) of the indictment.

On April 3, 1962, a verdict of guilty was returned by a jury to the four remaining charges of using the mails to defraud in violation of 15 U. S. C. 77 (Q) (A), the four remaining charges of violating 18 U. S. C. 1341, and the one charge of violating 18 U. S. C. 371, by conspiring to violate Section 77 (Q) (A) Title 15, U. S. C. and Section 1341, Title 18, U. S. C.

Timely motion for a new trial was thereafter filed and on the 12th day of April, 1962, the United States District Court for the Southern District of Florida, Orlando, Division, denied these defendants' motion for a new trial and entered its judgment and sentence of eighteen (18) years imprisonment against these defendants and notice of appeal was timely filed thereafter.

Respectfully submitted,

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Attorneys for the Petitioners.

Reasons for Granting Writ

Question No. 1. In the construction of 15 U. S. C. Section 77 (Q)(A) there is a myriad of holdings in the Second Circuit to the effect that the violation of this section is predicated upon the fraudulent scheme employed in the sale of securities and not in the use of the mails which is solely to create a basis for federal jurisdiction. These holdings are legion to the effect that each mailing or use of the mails does not constitute a separate crime or offense. Accordingly, for example, in the *United States v. Hughes*, D. C. N. Y. 1961, 195 F. Supp. 795, the Court consolidated the multiple counts of the indictment, each one alleging a mailing in carrying out the scheme to defraud, with the holding as enunciated by the Court of Appeals, that each mailing did not constitute a separate crime. In other jurisdictions there are holdings to the contrary. In the case at bar, each mailing in the First Five Counts of the indictment was held to be a separate crime or offense, contrary to the express holdings in the Second Circuit, with the result that petitioner's received a sentence of eight years when, in the Second Circuit the maximum sentence which could have been imposed by the Court was the term of two years.

With respect to the Five Counts of the indictment charging a violation of the mail fraud statute arising out of the sale of securities, there is likewise a conflict between the various circuits in their holding individually, as some holdings are to the effect that a violation stemming from the commission of identical acts constituting a crime could not under different statutes give rise to multiple crimes in the one case and in a single crime in the other case. It is respectfully submitted that conflict between the decisions of the Circuit Courts of Appeals require the granting of certiorari in the case at bar.

Question No. 2. The issue raised in this question strikes at the very heart of the "fair and impartial" requirements of our system of justice.

It is impossible for the Court to say under the facts of this case, that the petitioners, John Joseph Crane and Robert Bernard Sills, were given a fair and impartial trial; free also from bias and prejudice.

On the first day of the trial, petitioners were brought into the Court room in handcuffs and shackled. There were several persons present in the Court room when this incident occurred. A feeble effort was made by the Court to correct this extremely prejudicial occurrence by asking one or two persons if they had observed the petitioners while in handcuffs and shackled. These denied seeing anything. It cannot be assumed that prospective jurors did not witness this act. No effort was made by the Court to see if prospective jurors sitting in the hall had seen the petitioners in chains. Certainly a new jury panel should have been called to prevent the grave possibility of an injustice being done.

In addition to the courtroom incident, petitioners were brought in and taken out of the Federal Court building in handcuffs and shackles. It was necessary to pass through the hallway used by the trial jurors, to remove the petitioners from the courtroom. In additoin, petitioners were required to walk four (4) blocks morning and evening, chained together, to reach the county jail where they were lodged during the trial.

It would be impossible to have a fair and impartial trial under these conditions because of the conflict between the Fifth Circuit and other Circuits, this matter should be properly decided by this Court.

Question No. 3. Prior to trial application was made for discovery of all of the corporate books and records of Insured Capital Corporation, and the United States of America failed to disclose that they had either possession or control of the books, records and files of the Insured Capital Corporation.

However, upon the trial it appeared that the books and records of Insured Capital Corporation had been obtained by the County Solicitor of Orange County, Florida, pursuant to a subpoena. The books and records were turned over to the County Solicitor by an employee, not an officer, of Insured Capital Corporation, and on the eve of the trial they were turned over to the United States Attorney in charge of the prosecution of this action. A subpoena for their production upon the trial was first served the day the trial began, after the documents in question were already in the possession of the United States Attorney.

The defendants immediately made application to suppress the books and records of Insured Capital Corporation, predicated upon their acquisition as a result of an unlawful and illegal search and seizure by the officials of the State of Florida, and upon the further ground that their wrongful search and seizure by the State officials precluded their subsequent use by the Federal authorities upon the trial of this indictment. This motion was denied upon the trial after being made during the trial, although it was and is contended that the illegal search and seizure was a violation of the Constitutional rights of the defendants.

Each petitioner herein denied any knowledge of any wrongdoing by the principals of Insured Capital Corporation.

The petitioner John Joseph Crane, who was president of the said corporation, raises the protection accorded him by the Constitution against self incrimination. The records seized and secreted until the day of the trial, should not have been admitted as to him.

Since this is a seizure on the old "silver platter" doctrine, which has been declared unconstitutional, this Court should resolve this apparent conflict with the Fifth Circuit Court of Appeals.

Certificate of Service

I, E. Coleman Madsen, attorney for the petitioners, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that a true copy of the foregoing was mailed this .... day of August, 1963, to the Solicitor General, Department of Justice, Washington, D. C.

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Attorneys for Petitioners.

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 20003

JOSEPH A. PEEL, JR., JOHN JOSEPH CRANE, ROBERT BERNARD SILLS, ROBERT ZANE and HERBERT GILMORE,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

May 8, 1963

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

TUTTLE, Chief Judge: These are separate appeals on behalf of the five appellants who were tried and convicted in the Southern District of Florida for violating

the anti-fraud provisions of the Securities Act of 1933, 15 U. S. C. A. §17(q)(a), the Mail Fraud Statute, 18 U. S. C. A. §1341, and the conspiracy provisions of the criminal Code, 18 U. S. C. A. §371. A sixth alleged conspirator, Holzapfel, named in the indictment, was granted a continuance and severance for trial. Certain counts of the indictment and certain overt acts of the conspiracy count were dismissed on motion of the Government prior to the submission of the case to the jury. The jury then found the appellants guilty on all nine counts submitted to them.

The grounds of the appeal may be divided generally into three categories. The first, applicable to all the appellants, is their contention that the indictments and convictions were based on evidence which was obtained by the Government as the fruits of an illegal seizure. The second is the contention, made separately, on behalf of all except Peel, that the evidence was insufficient to warrant submission of their respective cases to a jury. The third is based on alleged errors of the trial court having to do with overruling objections to the introduction of testimony and on other actions of the trial court.

We deal first with the contention of the defendants that the trial court erred in not suppressing, and in not excluding from evidence, the books and records of Insured Capital Corporation, the corporate vehicle through which the Government sought to prove the defendants carried on their fraudulent scheme. These books and records were obtained from the office of Insured Capital Corporation in Orlando, Florida, where they were in the formal custody of a Miss Edminson, who was the Secretary-Treasurer of the corporation. The record made before

the trial court on the motion to suppress, and in support of subsequent objections to the introduction of the records in evidence, shows that none of the appellants was an officer or director of the corporation at the time the records were obtained. Evidence which both the trial court and the jury could believe tended to prove that three persons, Peel, Holzapfel and one Miles, who testified on behalf of the Government and who was named as a co-conspirator, but not as a joint defendant in the prosecution, were the principal operators of the business that had been transacted at the office of Insured Capital Corporation. There was also evidence that Sills and Crane had both been engaged under the direction of the first named three persons in carrying on certain of the functions of the business, and that Zane and Gilmore had been present in Orlando or the office of the corporation only once or twice and held no office or position with the company.

In this state of affairs, the County Solicitor of Orange County, Florida, acting under a Florida statute, Section 32.20,[1] caused a subpoena duces tecum to be served on Miss Edminson to produce all of the books, ledgers, stock certificate books, bank records, and all other documents relating to the operation of Insured Capital Corporation. Miss Edminson complied with this subpoena and turned the corporation's books over to the state officer without demur or complaint. These records were retained in the office of the County Solicitor for approximately a year

[1] "To have process.—The County Solicitor is allowed process of his court to summons witnesses to appear before him in or out of term time, at such convenient places and time as may be designated in the summons to testify before him as to any violation of the criminal law which they may be interrogated."

and a half without any demand being made for their return or any effort being made by the corporation, any of its officers, or any of the appellants seeking a return of the books. It does not appear that there was any office of the corporation maintained thereafter to which the books could be returned, or that there was any officer of the corporation who was interested in receiving them.

During the period of their custody by the County Solicitor's office, they were made available to investigators from the Securities & Exchange Commission and other federal agencies. Based at least in part on information obtained from the records, indictments were drawn and presented to the Federal Grand Jury, charging these appellants and Holzapfel with the offenses on which they have now been convicted. The books and records were actually subpoenaed by the United States Attorney a short time before the trial, after they had been physically surrendered by the County Solicitor's office to the United States Attorney's office for use on the trial.

Appellants contend that the acquisition of the records in this manner was an illegal seizure in violation of the Federal Constitution and that under the principle announced in *Jones* v. *United States*, 362 U. S. 257, and *Henzel* v. *United States*, 5 Cir., 296 F. 2d 650, a decision by this Court, they have sufficient standing as "aggrieved persons" to have the documents suppressed when sought to be used against them.

It is clear that the *Jones* case, while greatly relaxing the requirement as to the interest an accused must have in order to have standing to attack an illegal search or

seizure, does not cover the factual situation such as here before us. In *Henzel* v. *United States*, this Court found that where a Federal Investigating Officer, by agreement with a state court receiver of a corporation which was wholly owned and wholly operated by the accused, obtained delivery of all of the corporation's and some of the accused's personal papers in an investigation that was being conducted against the accused, the seizure of the papers was illegal and the accused had adequate standing to attack the seizure. In arriving at this conclusion, however, this Court made the following caveat:

> "This is not to say that every employee of a corporation can attack the illegal seizure of corporate property if the fruits of the search are proposed to be used against him. Each case must be decided on its own facts. We only hold, under the facts presented here, the appellant had a sufficient interest in the property seized and premises searched to enable him to challenge the propriety of the Government's conduct under Rule 41(e)."

Here the subpoena duces tecum ran to the corporation and was served on the Secretary-Treasurer, the only person in charge of the corporation at the time of service. Appellants did not allege in the trial court that this acquisition of the records by the County Solicitor's office was itself illegal under the laws of the state of Florida. Nor did they allege that the Florida statute authorizing it violated the Federal Constitution. They do here in the Court of Appeals for the first time seek to attack the legality of this seizure by the state officials. Nevertheless we do find that the trial court, in passing on the motion to suppress, made a finding to the following effect:

Appendix A

> "The property in controversy was possessed by an official of the State of Florida pursuant to legal process. The Court further finds and holds that the property thus seized was obtained in (sic) the possession of officials of Orange County, Florida, until it was delivered to the United States Securities & Exchange Commission for use in the prosecution of this case, and that such property is now lawfully in control and possession of the United States Attorney for this District."

Thus it appears that for a period of more than a year the County Attorney's office was in possession of the papers, subject to the right of any person having a legal interest in them to seek their return; during this time the corporation ceased operating, if in fact it had ever been operating in the true sense of the word, and during the entire period of time no persons showed the slightest interest in these papers or their custody. During this period, they were inspected by the Government agents and subsequently subpoenaed for use on the trial. We think we do not come to the question whether these appellants had standing to attack the seizure, because we find nothing in these circumstances that constitutes an illegal seizure even as to the corporation itself. As the proper custodian of the records of the corporation, Miss Edminson had a right to act on behalf of the corporation to surrender the records to a public official on proper request, either with or without a formal subpoena duces tecum. Such surrender would be binding on the corporation. It has long been held that while a corporation is protected by the illegal search and seizure provisions of the Fourth Amendment, *Silverthorne Lumber*

Co., Inc. v. *United States*, 251 U. S. 385, that very case recognizes that a corporation's papers, unlike those of an individual who is to be prosecuted, are subject to subpoena. In commenting on *Linn* v. *United States*, 251 Fed. 476, the Supreme Court said:

> "In Linn v. United States . . . it was thought that a different rule applied to a corporation, on the ground that it was not privileged from producing its books and papers; the rights of a corporation against unlawful search are to be protected *even if the same result might have been achieved in a lawful way.*" (Emphasis added)

Clearly the lawful way of achieving this result was by issuing a subpoena to cause the corporation's books to be produced. This is the basis of the decision in *Linn* v. *United States*. See also *United States* v. *White*, 322 U. S. 694 and *Hale* v. *Henkel*, 201 U. S. 43. Both of these cases explicitly deal with the right to subpoena a corporation's books, even though such books may tend to incriminate an officer or other person connected with the corporation.

There was, of course, available to the corporation the right to move to quash the subpoena, a matter to be tried by the Florida court before complying with the subpoena. See *Vann* v. *State*, 85 So. 2d 133. The availability of this right to a hearing before compliance satisfies the requirements of due process.

We next turn to the contentions by the several appellants that the evidence is not sufficient to warrant their conviction. We have carefully read the record references dealing with the testimony by which the Government seeks to tie Zane and Gilmore into the illegal acts. It is clear that the jury could believe that Peel, Holzapfel and

Miles had several conversations with these two appellants in their Miami office, and that together they worked out the plan which was actually put into effect—that is, that a company would be set up which would purport to sell its promisory notes to the investing public, which notes would bear interest at 8% and which purported to be secured by valid loans held by the company representing automobile or furniture chattel mortgages or purchase money notes, whereas in fact all of the proceeds from the sale of the notes by the corporation would be divided among the participants of the scheme. Moreover, we think it plain that the jury could believe testimony to the effect that substantial sums were actually paid for the benefit of Zane and Gilmore to their nominee, Mr. Bobbs Autos. Appellants attack the testimony dealing with the association of Zane and Gilmore with the operation on the ground that it was given substantially by a single witness, Miles, who was an admitted participant in the fraudulent transaction. While this circumstance leaves it open to the jury to view the testimony with skepticism, it does not destroy its weight or sufficiency once it is accepted as true by the jury. Once the trial court charged the jury adequately with respect to accomplice testimony, the jury could base its conviction entirely on the testimony of such accomplice. *Lutes v. United States*, 5 Cir., 249 F. 2d 744. Moreover as to part of Miles' testimony, there was corroboration. Gilmore and Zane were shown to have at least some interest in purchasing of the furniture for the Orlando operation from a furniture dealer in Miami. Miss Edminson testified that they came to the Orlando office "once or twice", that they "came in early one morning and left after

dinner," and that they talked with Miles and Crane, Sills and Peel. Furthermore, one of the checks drawn payable to Mr. Bobbs Autos, appears to have been endorsed by Zane. We conclude that the jury's verdict finding these two appellants participants in the crime was amply supported.

Looking next at the evidence seeking to implicate Sills and Crane, we find that in the latter period of the operation Crane was actually president of the company at a time when the investors were being bilked out of their so-called investments. Moreover the books and records of the corporation show that from March, 1960, to September, 1960, checks for $148,000 were made payable to Crane. Sills was a salesman, whose only defense seems to have been that in making his sales he did not know that the corporation was a complete fraud. He used the names of Miles and Crane on some occasions. The fact that Sills himself participated in the false representations to some of the investors and, for substantial commission, caused substantial sums to be invested in the company which were thereafter used in a manner inconsistent with the representations brings him, as does the testimony against Crane, within the language of a recent case of this Court. We believe that the jury might well have believed, as we stated in *Sherwood* v. *United States*, 5 Cir., 300 F. 2d 603, 605, that it "was inconceivable that he did not know anything about the stock he and his salesmen were selling, especially in view of the fact that the Continental stock was virtually the only stock they were selling for an eight or nine month period."

Appendix A

Appellant Peel does not contend that there was not sufficient evidence on which the jury might find him guilty of the crimes charged. The investors' testimony, together with that of Miles, clearly prove that the Government's main contention with respect to the fraudulent transaction and the use of the mails pursuant thereto, as well as the conspiracy, were sufficiently proved to go to the jury as to all defendants.

We have carefully considered the contentions of Sills and Crane that the trial court deprived them of a fair trial by reason of "inflammatory and prejudicial statements." We conclude that appellants have made no such showing as this Court referred to in *Kowalsky* v. *United States*, 5 Cir., 290 F. 2d 161, where we said that with respect to such an attack there must be a "clear showing . . . that the conduct was such as to carry a prejudice with it. . . . There must be something more to justify a retrial than a mere suspicion or feeling that prejudice may have resulted from this course. It must appear plain and clear." In this long trial, the trial court showed no leanings which could reasonably be calculated to prejudice either the accused or the Government.

Equally without merit is the contention made by Sills and Crane that they were brought into the courtroom on the first day, prior to the commencement of the trial, with handcuffs on. The trial court sought to ascertain whether any of the jurors observed anything of this nature, and this investigation failed to show any of them noticed their entrance at all and thus failed to show any prejudice to the appellants.

The contention on Peel's behalf that he was prejudiced by an inadvertent remark during argument of

counsel for appellants Crane and Sills to the effect that Peel and Sills had not testified, does not warrant a determination by this Court that Peel was prejudiced by such remark which was inadvertently made by counsel for a co-defendant. The court took immediate and prompt action to correct the error. The case is quite different from *DeLuna* v. *United States*, 5 Cir., 308 F. 2d 140.

We have considered the other contentions made by the appellants but find that there is no merit in any of them. The judgment of the trial court is therefore,

AFFIRMED.